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IN THE

SUPREME COURT OF THE UNITED STATES,

WARREN B. WILSON, *Appellant,*
vs.
LESLIE M. SHAW, Secretary of the Treasury, *Appellee.*

No. 43.

Appeal from the Court of Appeals of the District of Columbia.

APPELLANT'S REPLY BRIEF.

WARREN B. WILSON,
SOLICITOR *pro se.*

BARNARD & MILLER, PRINTERS, CHICAGO

IN THE

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WARREN B. WILSON, *Appellant.* *vs.* LESLIE M. SHAW, Secretary of the Treasury, *Appellees.*	19,796.

Appeal from the Court of Appeals of the District of Columbia.

APPELLANT'S REPLY BRIEF.

In the original brief, it was argued that the conditions precedent upon which the president was authorized to proceed with the construction of the canal had not been complied with, that the treaty with Panama was not a performance of the condition precedent that the President should acquire on behalf of the United States the perpetual control of a definitely ascertained strip of land across the Isthmus not less than six miles wide, etc., because the boundaries of the strip in which the rights described in the treaty were supposed to be granted to the United States were not defined in the treaty, nor any means afforded by which they could be defined, that the grant was therefore void for uncertainty.

To this, a most extraordinary answer is made.

"He (the President) has authorized the Governor of Panama to locate the boundaries of the zone, and the Governor has delimited the zone with the co-operation of the executive of Panama, and they do know where it is; and they do know where to arrest criminals and they do arrest, try, and punish them."

P. 19 and 20 of Appellee's Brief.

That is to say, the answer is that since the treaty the zone has been defined. That a supplementary agreement has been made between the United States and Panama under which the boundary lines have been located, that the courts have been organized, and they do arrest and punish criminals; that is, the man is in jail. That this supplementary agreement, which is a new treaty or nothing, was made on behalf of the United States by the Governor of Panama. This probably means the Governor of the Zone, to whom it is said, the President has delegated this authority; but it does not appear that the Senate has also delegated to this official its share of power and responsibility in the making of treaties. The advice and consent of the Senate were simply dispensed with. The maxim *de minimis non curat lex* is supposed to answer substantially all objections. This advice and consent of the Senate to the making of treaties, is probably regarded by counsel as one of the *minima*, which like statutory and other constitutional provisions, should be disregarded or set aside if they come in the way of this project. But the Senate has of late indicated a disposition to look at that matter differently. The argument is this: The President is au-

thorized to build, which is argued to include to locate, the canal. In the exercise of this power, he has authorized the Governor to locate the zone. Under this authority, the Governor has agreed with the executive of Panama on certain boundary lines for the zone, or, as counsel express it, "The Governor has delimited the zone with the co-operation of the executive of Panama."

But it manifestly does not follow, from the fact that the President has been authorized to build a canal in the zone, after the zone has been acquired by treaty and located, that he has authority to locate or build a canal anywhere, except in the zone already acquired. The act does purport to authorize the President to build a canal, when certain conditions precedent, including the acquiring the described rights in a definite strip of ground, have been complied with; but this does not include power to determine finally before the canal is built, where it shall be located. If the President has authority under the law and the treaty to locate the canal, why need he seek the further co-operation of the "Executive of Panama." If he can locate the canal, that *ipso facto* would locate the zone. Of course before he does any digging, he must find out where he wants to dig, but the fact—if it were a fact—that the President or some surveyors or commissioners, or other agents or employees, may have marked out a line along what at the time may seem to be the desirable route to build the canal over, does not locate the line of the canal, in the sense of determining definitely and finally just where it is to be built. Manifestly the President or his successor, in the exercise of the

same power, under which the original selection was made, could modify that location and take any other line that with the better information then available, would seem more advantageous. The canal is not located in this sense until it is constructed.

But he certainly is not authorized, and no attempt is made to authorize him to make any treaties or to in any way waive or modify any rights under any treaty. If he were authorized to locate the line of the canal, that is not what was attempted. A line of the canal was not marked out, and from that line measurements made five miles in each direction, but a new agreement was simply entered into, by which new lines were substituted or attempted to be fixed. The treaty expressly provides, that the zone is to be five miles on each side of the canal to be constructed; then this being unsatisfactory, a new agreement is entered into by which the rights of the United States in such a strip are waived and rights in another strip taken in lieu thereof, the boundaries of which at different points may immediately adjoin the canal, when, if ever, it is located and built, or the canal, if it should be built, might lie entirely outside the zone so located, and the protection deemed essential, namely, the control for five miles back of all ground approaching the canal, be surrendered in exchange for the control of some other useless and more remote ground on the other side. The treaty stipulates that the zone shall be five miles on each side of the canal to be constructed; the canal has not yet been located, even if the president has power, which till the zone is acquired and located he certainly has not, not even then in this sense, *i. e.*,

permanently so as to make a permanent base line from which to make these measurements, yet by a new agreement with Panama, the zone is located at points that may or may not cover the canal, when, if ever, it is located and built, and that certainly cannot be what the treaty provided, namely, five miles on each side; all without the advice and consent of the Senate.

The difficulty pointed out in the original brief was manifestly encountered as soon as the representatives of the United States went to Panama, and immediate steps were taken to overcome that difficulty promptly without delay or red tape.

No effort is made to answer the other objection that the legal result of vesting in the United States the permanent right to make the police and sanitary regulations for this strip has not been, and cannot be brought about except by an absolute cession of the strip; that neither the treaty making nor any other power is sufficient to effect a sale of the right to govern the people of this strip except as an incident to a transfer of the sovereignty.

That even if the right of the people as far as merely governing their own conduct is concerned be conceded to govern themselves by proclamation of the Czar of Russia or Acts of our Congress or resolutions of the board of directors of the Union Pacific Railroad Company be conceded, a stipulation that this should never be changed would be invalid.

But this is the exact legal status of the United States at the Isthmus.

The condition precedent that the permanent power to make laws should be first acquired in a definite ascertained strip of ground cannot be said to have been complied with when—not a square foot of ground can be identified to which any of the provisions of this treaty are applicable, except by insisting on the validity of a treaty made on behalf of the United States by the Governor of Panama, with the advice and consent of the President without consulting the Senate; and when even if the validity of this legislation for the time being be conceded, when even if it be supposed that as far as merely governing their own conduct is concerned the people and authorities of Panama might act according to proclamations by the Czar of Russia, Acts of the United States Congress, resolutions of the board of directors of the Union Pacific Railroad Company or laws to be made by astrologers, when even conceding all this, an authority exists in Panama independent of the United States, whether in legislatures or courts that have been or may be established in constitutional conventions or original acts of the people to put an end to it, and when the absolute legal accuracy of their course in so doing can be established by the official records of our own Federal Court. "The people themselves cannot do it."

Stone v. *Mississippi supra.*

In the brief filed for the appellee, the claim is now made that under the Commerce clause, Congress is authorized to build and operate railroads or other transportation plants. This question was referred to generally in the original brief, but then it was

taken for granted that no such power existed or would be claimed, but the claim of such power is now distinctly made and it is of too much importance to require any apology for a further discussion now that the claim is bluntly made (p. 23 of appellee's brief), though the only support in argument is cite the Pacific R. R. cases, *California* v. *P. R. R. Co.*, 127 U. S., 1, and *Luxton* v. *N. R. B. C.*, 153 U. S., 524.

The importance of this question can hardly be over-estimated. There are clauses of the Constitution which are mere historical landmarks forbidding wholly obsolete wrongs. For example, "No bill of attainder * * * shall be passed". No one would deny that a bill of attainder is a bad thing, and this clause would prevent it if anybody wanted one passed. But no bill of attainder has been passed by Congress since the beginning.

Neither has there been any such bill passed by Parliament in the same time nor for about a hundred years before. The thing is as obsolete as trial by wager of battle.

But if, as now contended, the grant of power to regulate commerce among the several states includes the power for Congress to itself take over the railroad and transportation system of the country, it certainly is a new discovery; and one of immediate and prime importance. This is a power which if it exists some one is liable to want to exercise.

The position taken is in substance this:

1. A railroad or like transportation plant is a public highway.

2. The construction and operation of a railroad is the same thing in law as establishing and maintaining a public highway.

3. The Commerce clause authorizes Congress to build and maintain inter-state highways. That any highway so situated that it does or may form a connecting link in a continuous line of inter-state commerce is an inter-state highway and may be built, owned, and controlled by Congress under the Commerce clause.

That a railroad or canal of this kind at the Isthmus is so situated that it does form such a connecting link in a continuous channel of commerce between New York and San Francisco and may therefore be built and operated by Congress under the Commerce clause.

The Court of Appeals takes the same position as to the identity of highways and transportation plants.

2. That the canal strip is part of the territory of the U. S.

3. That Congress may build and operate a railroad or commercial canal in this strip, as being the same thing as opening a street or country road in Arizona.

The answer to these positions is:

A railroad or commercial canal of this character or other transportation plant is not a public highway.

To establish and maintain a public highway is, as argued, public business that the general govern-

ing agent, a state in the state or Congress in the territories, may do.

But the *construction and operation* of a railroad or other transportation plant are the private business of carrying on commerce (dealing in transportation) so decided by the cases holding their construction as well as operation may be regulated under the Commerce clause, and the only thing that can be regulated under that clause is the private business of carrying on commerce.

2. That what is carrying on commerce in the state is carrying on commerce in the territories.

Building and operating a railroad is held to be carrying on commerce in the states. It is also carrying on commerce in the territories.

3. The authority of Congress in the states is to regulate some kinds of private commerce, in the territories to regulate all kinds. In neither state nor territory to carry on any form of private commerce, the carrying trade (which the construction and operation of transportation plants is) more than any other kind.

4. That in the states Congress may not do the public business of building and maintaining highways. In the territories it may do that as other public business.

5. That the construction and operation of this transportation plant in this foreign country is not permissible as an exercise of the power to regulate commerce because

(1) This is carrying on, not regulating commerce.

(2) It is not and in the nature of things cannot be confined to inter-state commerce.

(3) The thing is outside the territorial limit of the U. S.

Not as an exercise of the power to govern the territories, because (1) It is not the territory of the U. S., (2) It is carrying on commerce, and the right to carry on private commerce is not a part of the power of the U. S. to govern the territories.

Carrying on commerce is not government at all, any kind or anywhere.

Railroads Are Not Public Highways.

It is true that in some opinions they have been in figurative language referred to by that name. And the doctrine of those cases is not disputed. For the purposes of those cases they are to be so regarded. Property taken by a railroad company to be used as a means of carrying on the transportation business is to be regarded as taken for a public use and therefore eminent domain laws may properly be enacted to enable railroad companies to acquire the necessary land on which to install their plants. But the two are not the same thing.

Eminent domain laws may be enacted to provide for public necessity—not the necessity of the government, but of the public. Government is one, but only one of those necessities. Others quite as urgent are supplied through private commerce and

property taken to enable such business to be carried on is taken for a public use.

Clark v. *Nash*, 198 U. S., 361.
Strickly v. *H. B. M. Co.*, 200 U. S., 527.

The two things, railroads and public highways, are found side by side all over the country and no one ever mistook the one for the other. They differ as widely in their legal as in their physical characteristics. The cab drivers of Chicago, taking literally this language about railroads and highways being the same thing, insisted upon the right, unanswerably logical from those premises, to go upon the depot grounds and the right of way of the Pennsylvania R. R. Co., as upon other highways to solicit business. This court held their contention not sound—that while upon the sidewalk they might go as they chose about their lawful business, the railroad right of way was something different. That the railroad company could make its own regulations as to the use of its depot and right of way; and a grant by the railroad company of the exclusive privilege to one concern was valid, but could not so regulate the use of the sidewalk. In other words, that the railroad was one thing and the public street another.

Donovan v. *Penn. R. R. Co.*, 199 U. S., 279.

There are, as already suggested, roads and roads, just as there are houses and houses.

Nearly any corporation, political, trading or elemosynary, can build a house or a road; that is, can build some houses and some roads, but may not build other houses or other roads. It depends on

the general project they are to be used as means to carry out. These things are not ends in themselves, but means to an end.

If the end is to the particular corporation legitimate, *i. e.*, within its corporate powers, and the proposed road or house is an appropriate means to that legitimate end, then it may be built out of corporate funds, otherwise not.

For example, a corporation with corporate authority to manufacture and deal in steel products may build a steel mill. Such a house, adapted and intended as a means for manufacturing steel is a means appropriate to the end of manufacturing steel products, therefore such a corporation may build such a house. In building such a house a means to the end of manufacturing steel products, legitimate for that corporation, the corporation is manufacturing steel products.

But such a corporation may not build a Custom House because such a house is a means appropriate to the end of collecting taxes. That end for such a corporation is not legitimate; because it has no corporate power to levy and collect taxes.

Vice versa, Congress may build a Custom House, but not a steel mill, because Congress has authority to levy and collect taxes, but not to manufacture and deal in steel products.

A house to which the public and every member of the public may freely go to buy from or sell to any other member of the public is a public market. But a house or store adapted and intended to be controlled by one dealer, to which the public is invited to go

and does go not to deal with each other, but to buy from that one dealer, is the business plant of that dealer and can only be lawfully built by an individual or by a corporation having corporate authority to carry on the commerce it is adapted and intended as a means to carry on.

So a road adapted and intended for free public use to which the public and any member of the public may go freely to do his own carrying or to carry for any one else who may choose to hire him or to hire any one he chooses to carry for him, is a public highway.

But a road adapted and intended to be owned or controlled by one dealer in transportation, to which the public is invited to go and does go only to buy transportation from that dealer is the business plant of that dealer. It is a means appropriate to the end of carrying on the commerce of dealing in transportation.

Such a road can be built lawfully only by a corporation having corporate authority to carry on that commerce.

But if it appear that the corporation whose board of directors propose to apply the corporate funds to the construction of such a road is a corporation not having corporate authority to carry on that commerce but only for example, to establish and conduct an institution of learning or a government, not a trading corporation at all, applying the corporate money to the construction of such a road is a mere perversion of its funds that may be restrained at the suit of parties interested, shareholders in private and citizens in public corporations.

A transportation plant is a highway only in this way, that it is property employed by its owners in a business affected with public interest.

The carrying trade is public business in this sense, not because it is conducted over a railroad or highway but on its own account. Long ago, in the *New Jersey Steam Navigation Company* v. *The Merchants' Bank of Boston* this court called it *quasi* public business when carried on in a steamship.

A railroad or transportation plant is a highway, a public road in exactly the same sense that every hotel is a public tavern and a grain elevator a public warehouse.

But it is not a part of the Government. The carrying trade is not public business in the same sense as the proceedings of Congress or the court. All executive power is vested in the President, all legislative power in Congress, and all judicial power in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish. There is no room here for a tavern keeper, a warehouseman or a railroad company.

A highway is one thing, a road to be owned and *operated* is something else.

This is distinctly a road to be owned and operated. A trading corporation was engaged in the business of carrying freight and passengers across the Isthmus. But its plant was inadequate, the great defect being that it was necessary to break bulk, causing much delay and additional expense. The great *desideratum* was a plant that would transport

the ship as well as the cargo. Two schemes were suggested—a ship railroad and a canal. The latter was adopted. A great sum of money was spent. The company failed and went into bankruptcy. A new company was organized, nominally to finish the work, but really to save something out of the wreck. They made a pretext of working for awhile keeping alive their concessions, then they succeeded in loading the *debris* on to the U. S. Treasury. Congress took up the matter, succeeding to the right of the company and going ahead where it left off, and is now engaged in the carrying trade exactly like its predecessor and like its competitors.

Something has been said about building an ocean. This canal if ever completed is not to be a part of the high seas, the common property of everybody, but a plant to be owned and operated. The present carrying plant is simply to be enlarged and a track made of water instead of steel, the ship as well as the cargo to be added to the bill of lading, tug-boats substituted for locomotives, and the whole delivered at its destination in the original package.

Look at the statute and the treaty.

In the original brief it was argued that a further, and it would seem quite insuperable objection to the idea that authority for the government to itself build and operate railroads, is to be derived from the Commerce clause, is, that such "regulation" is not and in the nature of things, cannot be, confined to the kinds of commerce that Congress is authorized to regulate. There are railroads running from New York to Chicago; they all do both inter-state and local business; but the whole power of Con-

gress in respect to those roads is to prescribe the rule according to which that portion of their traffic which is inter-state, shall be carried on. Any regulation must be confined strictly to that traffic. A provision for example that the liability of such carriers for the safety of goods shipped by them, should be for reasonable diligence only and not that of insurers of their safety, if confined to inter-state commerce, would be valid; to local commerce as plainly void, and if embodying both inter-state and local traffic, so intermingled that the provisions could not be separated, so that the court could not assume the valid parts of the act would have been passed without the invalid, for example, an act reading, "Whereas it is desirable that uniform liabilities shall exist against carriers of local and inter-state traffic, therefore be it enacted that all carriers both inter-state and local, shall be subject to the same liability of reasonable diligence in carrying goods, such a provision would be manifestly void in *toto*.

But when Congress takes over the entire ownership, control, and operation of the road, that of course includes the entire traffic. Now if for Congress to take over and carry on the inter-state portion of the traffic, is regulating that commerce, and therefore justifiable under the Commerce clause, doing the same thing as to the local traffic is also regulating that commerce, and therefore void. But if, taking over and carrying on the local traffic is not regulating that traffic, as it plainly is not, doing the same thing as to inter-state traffic is not regulating that commerce. The whole thing is not regu-

lation at all, and entirely outside the field covered by this clause. It may be thought that as contended below, though the argument is abandoned here that if Congress is authorized to build a road or this canal, "for the purpose of sending commerce from New York to San Francisco, or from New York to South America it would be erroneous to hold we must not do it because other commerce would also pass through the canal.

Where a trading corporation lawfully acquires property in excess of requirements it may let out or use the surplus for purposes not within its charter to prevent needless waste. For example to take the familiar illustration, a hotel company built a hotel of some 600 rooms, more than could be profitably employed in the hotel business. The court held the surplus might be leased to the East India Company for its offices. It is probably under this theory that the railroad companies acting under congressional charter do local business. Congress of course could authorize nothing but interstate business; then the carrying company being established and having facilities to do more than the interstate business offered, and the local business being at hand, with the consent of the states, its surplus carrying capacity may be and is used for local business.

This of course would not apply to a corporation organized under the laws of a state. A legislature of New Jersey having general authority to regulate the relations of its citizens and of persons who come within its territory or submit themselves to its laws may give a corporation corporate authority

to carry on the mining business in California, the milling business in Minnesota, the cotton spinning business in Massachusetts according to such rule or subject to such conditions as the legislatures of those states may prescribe or to carry on interstate commerce according to such rule or subject to such conditions as congress may prescribe. But congress in creating an interstate transportation company, exercising only the "special" power to regulate interstate commerce can of course only give corporate authority for that special purpose.

But all this has no application to regulating commerce, or to the United States, or any other government, exercising its constitutional governing functions. The interstate commerce commission may be composed of the most able men, its work may all be in order interstate commerce properly regulated, and the commission with nothing to do; the local traffic may be never so badly in need of regulation, but the commission may not on this account, and congress cannot authorize them, to proceed to regulate the local traffic to keep it's staff busy. The judges of the federal courts at Chicago may be the most able men, the dockets of those courts may be clear, the judges and officers with nothing to do, but that does not authorize the Circuit Court of the United States for the Northern District of Illinois to take up the docket of the criminal court of Cook County and go to trying thieves and murderers and other offenders against the laws of the State of Illinois, to keep the judges out of mischief, and so the gallows won't get rusty and go to waste. So, whatever is done under the power to regulate com-

merce, must be confined strictly to interstate commerce; but to take over the entire road and all its traffic necessarily means and in this particular instance expressly contemplates taking charge of traffic other than the interstate and international commerce of United States to a much greater amount than that which is interstate commerce. The effect upon the two kinds of commerce is inseparable, the whole act is therefore void.

But take this in connection with the highway theory. The position is that inasmuch as a railroad and canal of this character at the isthmus are so situated that it would or might form a connecting link in a continuous channel of interstate commerce, it is an interstate highway, and may be built, owned and operated by congress under the commerce clause; that plants of this character and public highways are the same thing. The position then is, that any highway so situated that it does or may form a connecting link in a continuous line of interstate commerce, may be built or bought, owned and controlled in its entirety, and its use for every purpose controlled by congress under the commerce clause. Why there isn't a local lane in the country nor a street in a city that is not a connecting link an interstate highway in this sense. In *Donovan* v. *The Penn'a R. R. Co.*, 199 U. S. 279, decided at the last term, the court adverted to the fact that it was the practice to sell to passengers from eastern to western points through Chicago, tickets including coupons for a transfer by omnibus from the station of the arriving to that of the departing railroad. That is obviously interstate commerce. Congress could

prescribe the rule according to which those omnibuses should be run; and if local jealousy of interstate traffic should attempt to throw obstacles in the road, those obstacles could be removed; but the argument here is, that inasmuch as the streets over which those omnibuses must pass, are so situated that they may thus be used in interstate commerce; that congress may therefore not only regulate that portion of the traffic passing over them but may do the same thing to Michigan avenue and State street in Chicago that it is proposed to do with the so-called highway at Panama. That it may build them or buy them, own them and control them in their entirety, controlling their use for all purposes, interstate commerce and local commerce, and for purposes not commercial at all, may locate them, determine how long and how wide they shall be, whether they shall be paved with cedar blocks, asphalt or boulders;—in short do the same things that it is proposed to do with the road at Panama. Now if it is true that this is the proper construction of the constitution, that the local authorities in laying out and improving and regulating the use of the local streets are merly establishing "aids to interstate commerce," as in building bridges over the navigable waters under the tacit permission of congress that may be withdrawn at any time when congress chooses to take charge of the matter, it certainly is a new discovery. It may be that in the view of gentlemen who "hold rather radical views about the authority of congress under the commerce clause," or of the people of advanced ideas, referred to in *South Carolina*, v. *U. S.*, 199 U. S., 437, the constitu-

tion should be so read. But it is certain that nobody in 1789 understood it that way, and the constitution means now what it meant then. There is a screw loose somewhere in any reasoning that leads to such conclusions. But there is no possible escape from this conclusion from those premises; it is simply a case of All men are mortal, Socrates is a man; therefore Socrates is mortal. All highways so situated that they may be used as a connecting link in a continuous channel of interstate commerce are interstate highways and may be built or bought, owned and controlled in their entirety by congress. State street in Chicago is a highway so situated.

Therefore—

It is worth while re-examining any reasoning that leads to this impossible terminus. If we will go back to *Gibbons* v. *Ogden* and learn that the power and the only power of congress under the commerce clause, is to prescribe the rule according to which that commerce shall be carried on to make laws not roads or furnish facilities for anybody the trouble disappears.

This whole idea that the commerce clause authorizes furnishing facilities for the commerce it only proposes to regulate, proceeds on which I conceive to be a total misapprehension of the whole nature and object of that clause. It was not adopted because commerce was especially favored above other forms of industry. There was and is no more reason why merchants should be provided at public expense with facilities for carrying on their commerce than why miners, manufacturers and farmers should be provided at like public expense with the tools of their trades; but the difference was this; a

farmer in Virginia, or a miner in Pennsylvania, so far as merely planting and harvesting his crops or mining and reducing his ores, was concerned, was in no way interfered with by any laws that local jealousies might cause the legislatures of New York and Maryland to enact; but when it came to moving the products across the border and marketing the produce of one state in the markets of another, then those local jealousies did cause innumerable and almost impassable barriers to be erected in the way of that commerce. The whole object of the commerce clause was to remove those barriers. The matter is described in Mr. Webster's argument in *Gibbons* v. *Ogden* and is well illustrated in that case: where the laws of New York forbade the steamboat owner to use the waters of the state without a license issued under the authority of the State of New York, and where the laws of New Jersey authorized the man from whom the license fee or penalty had been exacted to recover back three times the amount, if he could find the other man in New Jersey, when the laws of New York forbade him to land without a license, and the laws of Connecticut forbade him to land if he had one. The result was that the man who wanted to do a coasting trade betewen New York, New Jersey and Connecticut had trouble. Then when the act of congress under the authority of the commerce clause issued to the coasting trader a license giving him affirmative federal authority, overriding all local laws, to carry on his commerce, all these troubles disappeared; the steamboats regularly plied between the ports of the different states, and the whole object

of the commerce clause, so far as related to that state of facts, was accomplished. But congress did not furnish to the coasting traders any steamboats or fuel or other facilities, it simply removed the artificial barriers out of his way and left him to provide himself with his own facilities like anybody else.

To the claim that this construction and operation of this transportation plant, railroad and commercial canal is an exercise of the right to govern the territories, it has been already replied,

1. This is not the territory of the U. S.

2. A transportation plant is not a public highway, and the general authority to build public roads does not include power to build and operate railroads or in any form carry on the transportation business.

It was pointed out that the political departments of the government had already determined that this strip was not part of the territory of the U. S.

This additional construction has been made on that subject. In a letter to Mr. J. E. Watson, a representative of Indiana, intended as a public exposition of his views on public questions, published Oct. 5th, 1906, the President said:

> "In affairs *outside of our own country* our great work has been beginning to dig the Panama Canal."

The attention of the court is again called to the letter of the president to the secretary of war at p. 173 of the original brief. He says:

> "We have not the slightest intention of establishing an independent colony in the middle of the State of Panama or of exercising any greater governmental functions than are necessary to enable us conveniently and safely to construct, maintain and operate the canal, under the rights given us by the treaty."

This would be strange language coming from the President of the United States about the territory of the United States. The plain duty of the U. S. in the territory of the U. S. is to make and enforce whatever rules and regulations are needful for the good of the people of that territory—to "exercise such governmental functions" as may be needed to promote the well-being of those people.

But by whom are the remaining "governmental functions" to be exercised? If this is the territory of the U. S., certainly not by Panama.

Suppose a man dies there, how will his estate be distributed? What law governs? The distribution of the estates of dead natives or the settlement of controversies of live ones has nothing to do with the canal.

But this construction by the political departments must be followed by the courts.

Foster v. *Neilson*, 2 Ret., 306.

This is plainly not the territory of the U. S., and no authority can therefore exist in congress to appropriate money to do anything there as an exercise of the power to govern the territory of the U. S.

2. But if it were the territory of the U. S., thi. could still not be defended.

The distinction made by counsel for the appellee between public and private business would apply here.

Congress would then have power generally to do public but not private business.

The reasoning as to the commerce clause applies here.

What is the public business of making highways in Illinois is the public business of making highways in Arizona.

What is the private business of carrying on commerce in the states is the private business of carrying on commerce in the territories.

If building and operating of railroads or other transportation plants in the states is carrying on commerce in the states, and therefore subject to congressional regulation in the states, it is carrying on commerce in the territories.

Where it is proposed to support a measure under the Commerce clause, the test is

(1) Is the matter proposed to be controlled the private business of carrying on commerce?

If it appears that this thing is either (1) "public business as building highways or hanging merderers," or (2) "private business other than commerce as mining or farming or manufacturing, it cannot be supported by this clause.

(2) If it appear that what is proposed to be done is anything else than prescribing the rule according to which persons engaged in that commerce shall carry it on, it cannot be supported.

The construction, as well as the operation, of a railroad or other transportation plants is the carrying trade.

In the Pacific R. R. and other cases, it has been determined that the construction and operation of such plants together constitute the carrying trade.

Reasoning not at all impossible would lead to the conclusion that while the operation of a railroad was commerce, its mere construction was something else—manufacture—but the court has taken the broader view that the construction of a plant adapted and intended as a means of carrying on the commerce of dealing in transportation was itself a part of that commerce.

When the court held

> "That Congress has authority in the exercise of its power to regulate commerce among the several states to authorize corporations to construct railroads across the states as well as the territories of the United States" (*Luxton* v. *N. R. B. Co.*, 153 U. S., 533),

it determined that such construction was carrying on commerce, was part of the commerce it was intended and fitted as a means for carrying on because the only thing Congress is empowered to authorize or forbid upon such conditions or according to such rule as it may prescribe is carrying on commerce.

The question, then, is simply this—that is, it would be the question if this canal strip were in the territory of the U. S., if the project were to build and operate a railroad in Arizona.

Does or does not the general grant to Congress

made by the Constitution of power to govern the territories include the power to carry on in the territory any private business, either affected or not, affected with the public interest? That question is surely its own answer.

There is public business and private business.

Private business is again divided into strictly private business like running a grocery store, and private business "affected with a public interest".

It will certainly be conceded that the right to carry on strictly private business is not included in a general grant of governing power, at least, as such a grant would have been understood in 1789, when the people made such a grant to Congress of power to govern the territories—nor does any different rule apply to the other kind of private business. The difference between the two is merely that while the person carrying on a strictly private business may sell or refuse to sell to such persons and upon such terms as he likes, owing to the general public necessity for the things dealt in, the person engaged in the other kinds of private business is under an obligation to sell his wares to anyone who applies and for a reasonable price and perhaps to all upon equal terms.

What effect upon the relation of the legislature to private business can the presence of that additional obligation cause? Manifestly, it can give, not the right for the Legislature to itself carry on this business—but only by appropriate legislation to enforce the discharge of those additional obligations.

Rippe v. *Becker*, 56th Minn., 100, cited and quoted from at p. 108 of the original brief, and other cases

there cited are directly in point and seem to be merely stating axioms.

But whatever may have been thought of this question before the decision of *South Carolina* v. *U. S.*, 199th U. S., 437, it cannot now be considered an open question. In that case, this court distinctly determined that the general governing powers of a state as understood in 1789 did not include the power to carry on any kind of commerce, even the kind affected in the highest degree with a public interest. There is no other business, conducting which carries with it any public obligations at all comparable with that of the liquor dealer.

The public injury resulting from a few cents or few dollars excessive freight rate is not to be compared with that resulting from the uncontrolled sale of intoxicants by irresponsible persons.

If the fact that a tradesman in the conduct of his business owes obligations to the public is sufficient to show the authority of the government, state or Federal, to itself take over and carry on the business to secure the discharge of those obligations, the liquor business is the one business to which the rule would apply. The liquor dealer owes obligations that more nearly concern the public interest, the public health, public order, and public welfare generally than any and all others combined. The Supreme Court of South Carolina for this reason claimed it to be an exercise of the police power of the state to itself take complete exclusive charge of the liquor business, though fully approving the ruling of the Supreme Court of Minnesota that the same doctrine would not apply to a state taking over

any other business affected with a public interest, that

> "The police power of a state to regulate a business does not include the power to engage in carrying it on. Police regulation is to be affected by restraints upon a business and the adoption of rules and regulations as to the manner in which it shall be conducted. * * *
>
> "The right of the state to embark in the construction and operation of these works cannot be predicated on the police power.
>
> "Railways are also under this same police power, the subjects of state regulation, and if it should be deemed they are not furnishing the public with proper service or charging unreasonable rates, it could with equal propriety be claimed that to be a proper means of exercising the police power of regulating the business, for the state itself to construct and operate competing railroads."
>
> *Rippe* v. *Becker*, 56th Minn., 100.

The same distinction was the basis of the opinion of the dissenting minority of this court. But this court held that the power to carry on even a business affected in this highest degree with a public interest was not a part of the general governing power of a state, as those terms were understood in 1789. That while there was nothing in the Federal Constitution that forbade the people to extend the functions of the local government into fields of trade, yet such things were extensions of the original powers of the state, and if they chose to embark in such enterprises they were to be treated like any other tradesman. That, therefore, the agents of the state of South Carolina for the conduct of the liquor business were subject to taxation by the Federal Government like any other saloon-keeper. In other

words, that the general governing power of the states, as understood in 1789, did not include authority to carry on any kind of commerce, no matter to how high a degree it might be affected with a public interest.

That the powers of the Government with reference to persons owing obligations to the public was not to itself assume and discharge those obligations, not to itself carry on the commerce in question to see that the obligations to the public were duly met.

But only by appropriate legislations to enforce the discharge of those obligations by the people who owe them.

But the authority of Congress in the territories is the authority of Congress in the states plus the power of the state government, *i. e.*, plus the general governing power of the state government as understood in 1789, when the grant of general governing power in the territories was made to Congress by the Constitution. This is submitted as decisive. Congress has not authority at the public risk and expense to engage in any kind of commerce the liquor trade, the carrying trade, or any other trade. But its sole authority is to govern. The only difference between the power of Congress over commerce in the states and in the territories is that in the state, Congress has power to prescribe the rule according to which a limited number of kinds of commerce shall be carried on; in the territories to prescribe the rule for all kinds of commerce.

This language taken from that opinion leaves nothing to be said.

"Moreover at the time of the adoption of the Constitution there probably was not one person in the country who seriously contemplated the possibility of government, whether state or national, ever descending from its primitive plant of a body politic to take up the work of the individual or body corporate. The public suspicion associated government with patents of nobility, with an established church, with standing armies, and distrusted all governments. Even in the high intelligence of the convention there were men who trembled at the power given to the President, who trembled at the power which the Senate might usurp, who feared that the life tenure of the judiciary might imperil the liberties of the people. Certain it is that if the possibility of a government usurping the ordinary business of individuals driving them out of the market and maintaining place and power by means of what would have been called in the heated invective of the time 'a legion of mercenaries' had been in the public mind the Constitution would not have been adopted or an inhibition of such power would have been placed among Madison's amendments." (p. 457.)

It is argued that the court should be slow to adjudge these proceedings void, because they are the acts of the president. (Page 16 of appellee's brief.)

The reasons have already been suggested why this consideration should not be given controlling force.

That such an official approaches and decides questions as to his own power in the spirit of an advocate rather than in that of a judge.

That the same objections exist against allowing his judgment controlling force that exist against allowing a man to be a judge of his own cause.

That objection being not merely that a party to a controversy is unwilling to be just to his adversary, but that as men are constituted it is very hard for a man to see that a thing in his own interest or which he greatly desires can be wrong, etc., etc. (Page 77 of original brief.)

But a special objection exists in the case of the present chief magistrate.

It has been and is the design of appellant in this matter, however lamely that design may have been and may be carried out, to discuss legal principles rather than to gossip about individuals.

But even in the case of a court whose opinions may be cited on any question, it would be pertinent to show in estimating the weight to be given the precedent that the members of the court were publicly committed to principles pertinent to the particular inquiry that were palpably unsound. For the same reason, it is proper here to quote the public utterances of the president, for whose actions so great weight is claimed, showing him to hold views upon the constitutional powers of the United States wholly at war with the most elementary and fully established principles.

In an address delivered at Harrisburg, Pa., on the 4th day of October, 1906, the president used this strange language:

> "He (Mr. Justice Wilson) developed even before Marshall the doctrine (absolutely essential not merely to the efficiency but to the existence of this nation) that an inherent power rested in the nation *outside of the enumerated powers* conferred upon it by the constitution in all cases where the object involved was beyond the

power of the several states and was a power ordinarily exercised by sovereign nations."

That is to say, in testing the question whether any act of the U. S. government is within its constitutional authority, the course is not the one always heretofore followed, viz., to assume that the U. S. is a government of limited and enumerated powers. Then compare the thing done or proposed with those enumerated powers, and if it is fairly within any one of those powers, approve it; if not, condemn it.

But this First ascertain that the thing proposed is within the powers of the states, then ascertain if it is fairly within any of the enumerated powers.

Both these inquiries being answered in the negative, we should not drop the matter as always before understood, but should institute a further inquiry whether the thing in question is one that foreign nations do. If that question is answered in the affirmative, then it is within the power of the U. S. government—a power that no state government can exercise; which is not within the enumerated powers of the federal government may yet be sustained as a legitimate power of the U. S. government, because it can be shown that it is one which the Czar of Russia, the Sultan of Turkey or the British Parliament holds and exercises.

Of course, there are no governmental powers that can lawfully be exercised in the United States except those held by the several state governments and the enumerated powers of congress, of the government of the United States and any department or officer thereof.

Of course, by the express language of the tenth amendment, all powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the people and the states respectively.

Of course, congress can lawfully pass no laws except those necessary and proper for carrying into execution the enumerated powers of congress and other powers vested by the constitution in the government of the U. S. or in any department or officer thereof.

Of course, all powers of government that can be lawfully exercised in the U. S. are held by the state government, subject only to the deductions made by the grant of the enumerated powers to the federal government, and of course if it is established that the thing in question is not within the powers of the state government and not within the enumerated powers, it is a thing that cannot lawfully be done at all.

Of course, the fact that a thing is done by governments whose power is avowedly absolute, subject to no constitutional restrictions, is no proof that the same thing may be done by a government that is subject to constitutional restrictions, rather which exists only as the grantee of certain enumerated powers.

This new, strange dogma is charged up to Chief Justice Marshall.

But, of course, Marshall never said anything of the kind. There is no doubt about what he did say. In *McCullough* v. *Maryland* and *Fisher* v.

United States he said, in substance, that in exercising the enumerated powers congress might employ any appropriate and not forbidden means, and it was not necessary that those means should all be set out in the constitution, it was only necessary that they should be appropriate and not forbidden. For example, it is among the enumerated powers of congress to lay and collect taxes, duties, imposts and excises. A custom house is an appropriate means for this purpose, therefore a custom house may be built, though custom houses are not mentioned in the constitution. That congress in using this appropriate means is exercising its enumerated powers.

That is, the United States may exercise its enumerated powers in any appropriate and not forbidden way.

But that is very far from saying that congress or any department or officer of the United States government may "do things" that are not an exercise of any enumerated power or a means fairly appropriate for that purpose.

The express purpose of establishing a constitutional government and enumerating its powers was to make a different government with different powers from those of the Old World.

Now, the theory upon which the courts have proceeded in deferring as far as they have to the other departments is that its members are also charged with the duty of enforcing the constitution, that the president is supposed to carefully compare what he proposes to do with the constitution and to thought-

fully reach the conclusion that his act is within the enumerated powers.

But here the contrary is distinctly avowed.

To be specific, all the inquiry the president would make, in this instance, would be, first, to ascertain that the thing was not in the powers of Nevada or Rhode Island and not among the enumerated powers of the federal government, but the English and French governments had gone into a similar but less hazardous speculation, and therefore the U. S. government could do the same thing. There is something to be said for this theory. It does cover the ground. There is no "straining" of any clause because the "straining" process is only called for by the theory that the government is one of enumerated powers and no others. It is admirable for many purposes. The only real trouble with it is that it is not the law.

But this is not dangerous. It is palpable. There is no special danger in an open, blunt attack like this on the elementary proposition that this is a government of limited and enumerated powers and no others.

It is this undermining process warned against by Washington in his farewell message, and Jackson and others (original brief, p. 190) that is dangerous.

It is this giving the words of the constitution that "enlarged construction which would extend words beyond their natural and obvious import" this starting with the assumption that any proposed action of the government is to be sustained and

searching through the constitution for more or less plausible pretexts and excuses for disobedience.

To "strain" this clause and contract that that out of its "natural and obvious import."

This "keeping the word of promise to the ear and breaking it to the hope."

So great a man as Calhoun in the internal improvement discussion made this strange argument:

> "'By giving a reasonable extent to the money power it exempted us from the necessity of giving a strained and forced construction to the other enumerated powers.'" (Calhoun's speech on the bill to establish the bank bonus as a public improvement fund.)
>
> Annals of Congress, 14th Congress, 2d Session, 1816-1817, pp. 855-856.

In other words, if legislators wanted to do anything the constitution as written did not allow, they would force an unnatural construction upon some clause, to make it cover the case; and it would be better to use this general wellfare expression as a kind of safety-valve, and preserve the appearance of obedience.

It might have occurred to Mr. Calhoun and to gentlemen insisting on this measure that there was and is another possible alternative, viz., to obey the law and not do the unauthorized or forbidden things.

It is from this source only that the constitution is ever in any danger, and not from any open, blunt, undisguised insistence on the right to "do things" because the Czar of Russia does them.

As suggested in the original brief, if counsel is right that there is only one man in the United States

who is opposed to this scheme, who believes it to be unwise and unlawful, there is no serious trouble about securing the necessary authority. It would, under those circumstances, take but little time to refer the matter to the people and let them decide whether upon consideration they think their welfare calls for this additional grant of power. Then the thing could be carried through, and we would be free from the great guilt of having sacrificed elementary constitutional principles to gratify an ungovernable greed for haste.

The only danger to the scheme would be that the people might on reflection conclude that the habit of staying at home and attending to their own affairs and neglecting everybody else's had worked well in the past and was a good one to adhere to, and that is a question that the people have the right to determine for themselves and that they have deputized no one else to determine for them.

In an address to the graduating class of the Yale Law School delivered on June 27, 1904, the present secretary of state used this language:

> "The cry of 'emperor,' 'czar' and 'man on horseback' are but extravagant appeals to an instinct which ought to exist and happily does exist among us against submission to unlawful authority, however trifling may be its exercise and however beneficent its despotism.
>
> There is a constant tendency to ignore such limitations and condone the transgression of them by public officers, provided the thing done is done with good motives from a desire to serve the public. Such a process, if general, is most injurious. If continued long enough it results in an attitude of personal superiority

on the part of great officers which is inconsistent with our institutions, a destruction of responsibility and independent judgment on the part of lower officers, and a neglect of the habit of asserting legal rights on the part of the people.

The more frequently men who hold great power in office are permitted to overreach the limitations imposed by law upon their powers, the more difficult it becomes to question anything they do, and the people, each one weak in himself and unable to cope with powerful officers, who regard any questioning of their acts as an affront, gradually lose the habit of holding such officers accountable, and ultimately practically surrender the right to hold them accountable. Constant accountability of public officers for strict observance of the limits imposed by law and customary and undoubting assertion of the private right of the citizen to have no power exercised over him except in strict accordance with the letter and the spirit of the law—these are the essential conditions of free government and personal independence."

There is much in this matter which this language illustrates.

It is further claimed that

"the payment sought to be enjoined having been made and thirty million dollars in bonds issued of which the court will take judicial notice, this attempt to restrain payment is largely a moot question which the court will not consider." (Appellee's brief, p. 3.)

This is a strange proposition. At the time when this suit was brought no money had been paid out. It was brought promptly as soon as the facts justified it, and has been prosecuted ever since with every possible diligence.

After the suit was brought the defendant hastened to pay out as much money as possible to remove as much as possible beyond the jurisdiction of the court and make the public injury as great as possible in the event of an adverse decision.

All this, of course, will not cause the court to attempt the impossible thing of enjoining the payment of money already gone. But the fact that $60,000,000 of public money has been lawlessly thrown away is no reason why three, five or six hundred millions more should be treated in the same manner.

A horse thief might as well complain that he was inequitably dealt with in being obliged to return the stolen animal when by promptly, strenuously and courageously doing things he had managed to get away with the saddle and bridle before the sheriff caught him.

In the brief now filed for the appellee in this court for the first time reference is made to provisions other than the commerce clause, but no effort is made to support that position by argument.

The position of the Court of Appeals that congress has power in the territories to construct highways is referred to, as also the war power and the postoffice claims.

But no argument is attempted on these subjects and if deemed material the views of appellant on these subjects are in the original brief.

Judging from the amount of attention the different subjects receive at the hands of the appellee,

any idea that this measure has any constitutional basis is substantially abandoned.

Almost the entire argument in one form or another is that notwithstanding the plain fact that there is no such constitutional authority, yet for one reason or another the courts should not interfere, but the unconstitutional outlay should be allowed to continue.

The canal will cost too much, on this basis. The money outlay, colossal as it promises to be, is a mere bagatelle compared with the incorporation into our laws of such doctrines as——

That in administering the public funds, citizens and the public have no rights that government officials are bound to respect.

That when any high officer of the federal government makes up his mind to violate the constitution by using the public money in any honest or dishonest personal or public speculation, all he has to do is to rush ahead and get a considerable sum of money spent, and the courts will then let him continue indefinitely, or

That this court, to which the people have so long and so securely looked for the enforcement of the constitution, will decline to enforce it, in a case where it applies because in that event some flashy speculation with a tinge of romance that for the moment may have caught the passing whim of the multitude and that impulsive headstrong and self-willed executive officers have carried so far that it would embarrass them to drop it, would nevertheless have to be dropped.

But this $60,000,000 is not badly invested if it gives occasion for a much needed announcement from this court with unusual emphasis of the basic principle of the supremacy of the law and the absolutely binding obligation of obedience upon men in high places as well as the lowly.

It is respectfully submitted there is no possible constitutional justification for this measure and the decree should be reversed.

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